IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TIMOTHY J. NOVAK,
K.N., S.N. and M.N. by their mother, LISA
NOVAK and LISA NOVAK,

OPINION AND
ORDER

Plaintiffs,

03-C-0093-C

v.

SAWYER COUNTY, HENRIETTA WATSON,
DUNN COUNTY, LINDA SHINDLER, TERRANCE
J. WITT, M.D., JOSEPH W. HEIMLER, M.D.,
MICHAEL D. FEIGAL, M.D., and DEF INSURANCE
COMPANY,

Defendants.

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This is a civil action for monetary and other relief brought pursuant to 42 U.S.C. § 1983. In their complaint filed on February 26, 2003, plaintiffs Timothy Novak, K.N., S.N., M.N. and Lisa Novak alleged that Dunn and Sawyer counties and various jail employees, nurses and physicians violated their Eighth Amendment rights by denying plaintiff Timothy Novak adequate medical treatment to his injured right leg during his incarceration, with the result that plaintiff Timothy Novak had to have his leg amputated below the knee after his

release and causing the remaining plaintiffs, plaintiff Timothy Novak's wife and children, loss of society and companionship. Defendants have answered the complaint. In their answer, defendants Terrance Witt, Joseph Heimler and Michael Feigal admitted that they are the doctors who provided medical care to plaintiff Timothy Novak but denied that they were employed by Dunn County. (For brevity, I will refer to defendants Witt, Heimler and Feigal as the physician defendants).

In response, plaintiffs have filed a motion to amend their complaint to add a state law medical malpractice claim against defendants Witt, Heimler and Feigal. As a basis for jurisdiction, plaintiffs point to 28 U.S.C. § 1367, which permits federal courts to hear state law claims when they are part of the same case or controversy as a federal claim. Because the negligence claim against the physician defendants arises from the same facts as the Eighth Amendment claim, supplemental jurisdiction is appropriate. In addition, defendants Dunn County, Sawyer County, Henrietta Watson and Linda Schindler have filed a motion to dismiss several of plaintiffs' claims. For the reasons discussed below, plaintiffs' motion to amend their complaint will be granted in part and denied in part and defendants' partial motion to dismiss will be granted.

OPINION

A. Motion for Leave to File an Amended Complaint

Fed. R. Civ. P. 15(a) states that after an answer has been filed "a party may amend [its] pleading only by leave of court" and that "leave shall be freely given when justice so requires." The Court of Appeals for the Seventh Circuit has enumerated four conditions that justify denying a motion to amend: undue delay, dilatory motive on the part of the movant, repeated failure to cure previous deficiencies and futility of the amendment. See Cognitest Corp. v. Riverside Publishing Co., 107 F.3d 493, 499 (7th Cir. 1997). In addition, a motion to amend should not be granted if it will unduly prejudice the opposing party. See Samuels v. Wilder, 871 F.2d 1346, 1351 (7th Cir. 1989).

In this case, there can be no argument of undue delay. Plaintiffs' proposed amended complaint was filed on the date set by the magistrate judge and agreed to by the parties at the preliminary pretrial conference. Moreover, the physician defendants do not assert dilatory motive or failure to cure previous deficiencies. Instead, they oppose the motion on the grounds that the amendment is futile and unduly prejudicial to them.

1. Futility

Plaintiffs alleged in their complaint that the physician defendants were employed by the county. These defendants deny that they were so employed but argue that, in either

case, plaintiffs cannot proceed against them.

First, the physician defendants argue that if they were county employees, Novak's negligence claim is barred by Wis. Stat. § 893.80(1). Section 893.80(1) imposes two requirements on parties bringing claims against a "governmental subdivision or agency" or an "officer, official, agent or employee" of the subdivision. First, the claimant must give the defendant notice of claim within 180 days (if medical malpractice is alleged) of the injury. Wis. Stat. § 893.80(1)(a). Second, the claimant must present an itemized list of statement of relief sought to the defendants and allow them an opportunity to disallow the claim. Wis. Stat. § 893.80(1)(b).

Plaintiffs concede in their reply brief that they have not satisfied the requirements of Wis. Stat. § 893.80(1). However, they point out that failure to comply with the 180-day notice requirement of § 893.80(1)(a) does not bar a claim unless the defendant has been prejudiced by the delay, see Nielsen v. Town of Silver Cliff, 112 Wis. 2d 574, 334 N.W.2d 242 (1983), and they argue that the physician defendants have not been prejudiced. What plaintiffs do not address is case law holding that a court must dismiss a claim against public defendants if the plaintiff has failed to present an itemized statement of relief to the defendants and allow them an opportunity to disallow the claim, as required by § 893.80(1)(b). Orthmann v. Apple River Campground, Inc., 757 F.2d 909, 911 (7th Cir. 1985) ("Section 893.80(1)(b), unlike (1)(a), contains no excuses"). Therefore, if the

physician defendants are agents or employees of the county, plaintiffs could not maintain a state law action against them until they complied substantially with § 893.80(1)(b). Fritsch v. St. Croix Cent. School Dist., 183 Wis. 2d 336, 343-44, 515 N.W.2d 328, 331 (Ct. App. 1995) (substantial compliance with Wis. Stat. § 893.80(1)(b) is sufficient to satisfy its requirements).

Of course, if the physician defendants were not employees or agents of Dunn County, § 893.80 would not apply. However, defendants argue that plaintiffs' amendment would be futile even if the physician defendants were not acting on behalf of the county. Defendants contend that it is inconsistent for plaintiffs to allege a right to recovery under § 1983, which applies only if the physician defendants were acting "under color of law," and at the same time assert a state law claim that is viable only if the physician defendants were not employees or agents of the county. In defendants' view, plaintiffs cannot succeed on both claims. If the physician defendants are not employees of the county, they were not acting under color of law, meaning that plaintiffs' Eighth Amendment claim must fail. If the federal claim is dismissed, the only claim remaining would be the state law claim plaintiffs are attempting to raise in the amended complaint and the court would be unlikely to exercise supplemental jurisdiction over it once the federal claim is gone from the case. See 28 U.S.C. § 1367(c)(3).

Defendants are correct that it is futile to amend a complaint to add a claim that could

not survive a motion for summary judgment. Bethany Pharmacal Co., Inc. v. QVC, Inc., 241 F.3d 854, 861 (7th Cir. 2001). However, defendant physicians' argument that plaintiffs' added claim would fail to survive a motion for summary judgment is unpersuasive. Whether a person was "acting under color of law" for the purpose of establishing an Eighth Amendment claim is a question of fact. See Pickrel v. City of Springfield, Ill., 45 F.3d 1115, 1118 (7th Cir. 1995). There is a possibility that either party could put into dispute the question whether the physician defendants were acting under color of law, precluding a grant of summary judgment to either side. If it could not be determined until trial that the physician defendants were acting under color of law, it would be inappropriate to dismiss the state law claim at such a late stage in the proceedings. See Miller Aviation v. Milwaukee County Board of Supervisors, 273 F.3d 722, 732 (7th Cir. 2002) (when district court dismisses all federal claims, it should not dismiss remaining state law claim under 28 U.S.C. § 1367(c)(3) if doing so would waste judicial resources).

Alternatively, the physician defendants argue that plaintiffs' added claim is futile because the three-year statute of limitations has run on their medical malpractice claim. See Wis. Stat. § 893.55(1). Although it is clear from the complaint that plaintiff Timothy Novak was in the care of the physician defendants more than three years ago, plaintiffs contend that they are relying on a theory of "greater harm," under which the statute of limitations begins to run when the allegedly negligent treatment of an existing medical

condition later results in a greater harm, here, the amputation of plaintiff Timothy Novak's leg. See Paul v. Skemp, 2001 WI 42, 242 Wis. 2d 507, 625 N.W.2d 860 (actionable injury arises when the physician's misdiagnosis causes a greater harm than existed at the time of the misdiagnosis). The physician defendants do not contest plaintiffs' assertion that the amputation occurred on or around January of 2001, which is less than three years before February 26, 2003, when plaintiffs initiated this lawsuit.

Finally, although parties assume that plaintiffs' state law claims are properly heard by this court under supplemental jurisdiction, there is a possibility that diversity jurisdiction exists in this case under 28 U.S.C. § 1332. Plaintiffs list a Wisconsin address for plaintiff Timothy Novak in the caption of the complaint, but allege in the body of the complaint that he resides in Illinois. Although plaintiffs do not specify an amount of controversy, an injury that results in an amputation of a limb can reasonably entitle plaintiffs to damages in an amount exceeding $75,000 as required by 28 U.S.C. § 1332. If diversity jurisdiction is present in this case, then I would not have discretion under 28 U.S.C. § 1367 to dismiss plaintiffs' medical malpractice claims, even if plaintiffs' Eighth Amendment claim were to fail. If plaintiffs' claim is appropriately raised in this court under the diversity jurisdiction statute, amending the complaint to add the claim would not be futile.

2. Prejudice

The physician defendants contend also that if this court were to grant plaintiffs' motion, it would be unduly prejudicial to them because there is a mediation requirement for medical malpractice imposed by Wis. Stat. § 655.43 that will delay the disposition of this case. However, the physician defendants have failed to support their assertions of undue prejudice.

Wis. Stat. § 655.43 requires that parties to a medical negligence action participate in mediation under the auspices of the state supreme court. A plaintiff must file for mediation within 15 days of filing the claim. Wis. Stat. § 655.445. This mediation period lasts for 90 days after the director of state courts receives a request for mediation, during which time any court proceedings must stop. Wis. Stat. § 655.465(7).

As the physician defendants note in their brief, the magistrate judge already has conducted a preliminary pretrial conference and set the discovery schedule and the trial date in this case. Although it is true that those dates will have to be continued for approximately 90 days if plaintiffs' motion to amend is granted, the extended deadlines and a later trial date affect all parties equally. "[V]irtually every amendment to a complaint results in some degree of prejudice to the defendant in that the potential for additional discovery arises as well as the possibility of a delay of the trial date." Conroy Datsun Ltd. v. Nissan Motor Corp. in U.S.A., 506 F. Supp. 1051, 1054 (N.D. Ill. 1980). The physician defendants have

not made a showing that the 90-day delay will cause them an undue burden. Therefore, I conclude that granting the motion to amend their complaint would not unduly prejudice the physician defendants.

Because defendants advance no persuasive reason why plaintiffs' motion to amend should not be granted, the motion will be granted to allow the addition of plaintiffs' state law claims of medical negligence.

B. The Proposed Amended Complaint and Plaintiffs K.N., S.N., M.N. and Lisa Novak

The proposed amended complaint is identical to the original complaint with respect to the claims of plaintiffs K.N., S.N., M.N. and Lisa Novak. Specifically, these plaintiffs allege that they are entitled under 42 U.S.C. § 1983 to recover damages for loss of society and companionship caused by the violation of plaintiff Timothy Novak's Eighth Amendment rights. They make no claim of injury related to plaintiff Timothy Novak's new state law claims.

In response to the original complaint, defendants Dunn County, Sawyer County, Henrietta Watson and Linda Schindler moved to dismiss plaintiffs' claims for loss of society and companionship on the ground that such a claim is not cognizable under 42 U.S.C. § 1983. In response, plaintiffs wrote to the court, conceding that these claims should be dismissed. Defendants' motion to dismiss these claims will be granted and these plaintiffs

will be dismissed from the lawsuit.

C. Stay of the Proceedings

Wis. Stat. § 655.465(7) requires the court to stay plaintiff Timothy Novak's medical malpractice claim for at least 90 days. Although this suit also includes an Eighth Amendment claim, I believe that the whole case should be stayed for the sake of simplicity. Therefore, the case will be stayed for 90 days from the date plaintiff Timothy Novak delivers to the director of state courts a request for mediation or 93 days from the date plaintiff sends a notice by registered mail requesting mediation. If plaintiff Timothy Novak wishes to pursue his medical malpractice claim against the physician defendants, he must file for mediation within 15 days of this order, as required by Wis. Stat. § 655.445. Further, I will require plaintiff promptly to file with this court and opposing counsel proof that the request was made. If plaintiff decides not to pursue the claim, he is to advise the court and opposing counsel of his decision no later than October 27, 2003.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion for leave to amend the complaint is GRANTED in part and

DENIED in part. It is DENIED as to the claims of plaintiffs K.N., S.N., M.N. and Lisa Novak, because these plaintiffs are being dismissed from the case. In all other respects, the motion is GRANTED.

2. Defendants' motion to dismiss plaintiffs K.N., S.N., M.N. and Lisa Novak from this case is GRANTED.

3. The amended complaint will be considered as having been filed and served as of the date of this order.

4. No later than October 22, 2003, plaintiff Timothy Novak is to file with the director of state courts a request for mediation pursuant to Wis. Stat. § 655.43 and promptly thereafter notify the court and opposing counsel that he has done so; alternatively, plaintiff is to advise the court and opposing counsel no later than October 27, 2003, that he is not pursuing his state law medical malpractice claim.

5. Assuming that plaintiff pursues his state law medical malpractice claim, all proceedings in this court are STAYED until January 21, 2004, and the trial date and deadlines scheduled in the magistrate judge's July 10, 2003 preliminary pretrial conference order are RESCINDED.

6. The clerk of the court is directed to schedule a status conference to be held in this

case in late January 2004, after the 90-day stay has expired.

Entered this 10th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge